

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
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Request for Review of the Decision of the)
Universal Service Administrator by)
)
The Albuquerque School District)
)
Federal-State Joint Board on) CC Docket No. 96-45
Universal Service)
)
Changes to the Board of Directors of the) CC Docket No. 97-21
National Exchange Carrier Association, Inc.)

REQUEST FOR REVIEW OF THE DECISION OF THE
UNIVERSAL SERVICE ADMINISTRATOR BY
THE ALBUQUERQUE SCHOOL DISTRICT

MODRALL, SPERLING, ROEHL, HARRIS
& SISK, P.A.

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May 23, 2003

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SUMMARY

The Albuquerque Public School District (“APS”) requests Commission review of the March 24, 2003, Funding Commitment Decision Letter issued by the Schools and Libraries Division (“SLD”) of the Universal Service Administrative Company (“USAC”). The SLD denied funding because it believed APS’ Form 470 did not allow for competitive bidding on major new initiatives. Contrary to the allegations contained in the SLD’s denial of funding letter, the services requested were competitively bid. The State of New Mexico has, through a competitive procurement process, obtained pricing agreements for use by all branches of the state government (state agencies, local public bodies, school districts, etc.) and APS, after complying with Commission rules on submitting and posting FCC Form 470, was able to use one of the selected vendors to achieve cost-effective and cost-efficient acquisition of quality products and services needed to implement its technology plan. There was no bidding violation. Additionally, APS’ requested funding is not designed to implement any “major new initiative.” Rather, the requested funding is needed to implement the next step in APS’ five year Technology Master Plan, pursuant to which the SLD had previously granted funding.

That APS’ request for funding was not granted while substantially similar requests from other districts around the country were granted is unjust and unwarranted. APS’ students should not be deprived of much-needed technology assistance simply because the SLD misunderstands state and local procurement practices. If the SLD has now decided to reject previously accepted competitive bidding practices, its new standard should be clearly articulated and applied only prospectively. The ad hoc, retroactive prohibition that the SLD has decided to place on APS unfairly prejudices some of the nation’s poorest students.

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**REQUEST FOR REVIEW OF THE DECISION OF THE
UNIVERSAL SERVICE ADMINISTRATOR BY
THE ALBUQUERQUE SCHOOL DISTRICT**

The Albuquerque Public School District ("APS"), pursuant to Section 54.719 of the Commission's rules, hereby submits its Request for Review of the Universal Service Administrator's decision denying the following funding requests: FRN 856741, 856765, and 856797.

I. FACTUAL BACKGROUND

APS is the largest school district in New Mexico, with over 85,000 students. APS serves some of the poorest children in the country, as demonstrated by the fact that, of its 85,000 students, roughly 22,500 are located in schools eligible for 90% discounts based on poverty levels and urban/rural status. The Federal Communications Commission ("FCC") established the Schools and Libraries Funding Mechanism (the "E-Rate program") in 1997 to provide

financial support to school districts like APS for purchasing Internet access, internal connections, and telecommunications services.

Schools within APS participated in the E-Rate program on an individual basis during the first three years of the program's existence.¹ In the fall of 2001, APS consolidated its technology planning and developed an instructionally-focused district-wide Technology Master Plan. As a result of adopting the district-wide plan, APS moved to a single, coordinated, district-level application, as opposed to isolated, uncoordinated applications by individual schools. Adopting a district-wide technology plan resulted in a 10-fold increase in funding to the district and to individual schools for the 2001-2002 funding year.² Having received E-Rate funding pursuant to its technology plan to wire its schools in Year 4, APS submitted a Year 5 application that requested services to implement the next phase of its technology plan. After posting a Form 470 on the Schools and Libraries Division ("SLD") website and locating a vendor to provide the requested services, APS applied for discounts under the E-Rate Program.

In March of this year, the Universal Service Administrative Company-Schools and Libraries Division ("USAC-SLD") issued a letter denying the requested funding. Each funding request was denied because "Applicant [APS] did not identify the specific services sought – either clearly on the 470 or in the RFP – to encourage full competition on major new initiatives."³

¹ The total funding received by individual schools within APS during the first three years is as follows: 98-99 (\$890,950), 99-00 (\$478,939), 00-01 (\$1,385,441).

² APS received \$13,782,235 in funding for the 2001-2002 year pursuant to its technology plan.

³ See March 24, 2003 USAC-SLD Letter Denying Funding (attached as Exhibit "A").

II. THE ALBUQUERQUE PUBLIC SCHOOL DISTRICT SELECTED THE MOST COST-EFFECTIVE PROVIDER TO IMPLEMENT THE SERVICES CALLED FOR IN ITS TECHNOLOGY MASTER PLAN THROUGH A COMPETITIVE BIDDING PROCESS THAT FULLY COMPLIED WITH FCC, SLD, AND STATE REQUIREMENTS

The SLD indicated in its funding denial letter and in conversations between SLD personnel and APS staff that the denial of funding was based on the misimpression that this procurement represented a major new initiative by APS for which it failed to conduct a sufficiently competitive procurement process. As is set forth in the following paragraphs, this characterization is inaccurate and uninformed. The procurement is not a “major new initiative” but an incremental step in implementing APS’ technology plan and deploying the facilities needed to obtain Internet access in APS classrooms. In addition, APS fully complied with state and APS procurement law and rules and FCC regulations by conducting a competitive procurement, which was also in accordance with state and local procurement rules.

A. This Is Not A “Major New Initiative”

APS is not attempting to fund a major new initiative. Rather, APS is trying to sustain an ongoing program designed to provide appropriate technology services to its students. Contrary to the assertion in the SLD’s denial of funding letter, the APS’ Year 5 application did not include any “major new initiatives.”

APS has in place what it refers to as its Technology Master Plan (“TMP”).⁴ The TMP was developed with input from the individual APS schools by the APS Technology staff.⁵ The TMP, which is 70 pages long, was published and approved by the Board of Education of APS on September 21, 2001. The TMP, as adopted in 2001, was designed to “facilitate implementation of technology, in a strategic fashion, throughout the district in support of student achievement

⁴ See APS’ TMP (attached as Exhibit “B”)

⁵ See Affidavit of Maureen Davidson (attached as Exhibit “C” ¶ 2)

and enhanced life and work skills.”⁶ APS asked the voters to approve a \$117.6 million General Obligation Bond and a \$74.8 million Two-Mill Levy in February 2002. Almost \$50 million of which was to be used to accelerate the needs identified in the Technology Master Plan. A copy of one piece of promotional literature for the election is included.⁷ Unfortunately the voters turned down the General Obligation Bond and Mill Levy request.⁸

Section 5 (“Technology Infrastructure”) of the TMP sets forth APS’ master plan for creating the needed framework for achieving the aforementioned technology-based goal.⁹ The wiring of classrooms and schools with internal connections was one of the specific projects called for in the TMP (project ID TI-4).¹⁰ Pursuant to the TMP, APS’ Year 4 application contained funding requests intended to provide wiring for APS’ 41 poorest schools. This request was funded in the amount of \$13,782,235. After obtaining funding to wire these classrooms with internal connections, the Year 5 application (the subject of this appeal) followed the TMP and requested funding for support infrastructure to ensure stable, safe, and secure network connectivity in those 41 schools.¹¹

Moreover, APS is unaware of any Commission rule or regulation establishing additional requirements for “major new initiatives,” as the term is found nowhere in the FCC’s rules or orders. Nor is there any mention of “major new initiatives” on the SLD website or within its instructions. When asked about this, the SLD indicated that this language (on which the denial of funding to APS was based) stemmed from an FCC ruling in a matter involving the Brooklyn

⁶ See APS’ TMP, pp. 1-2 (Message from Thomas Ryan, Executive Director for Technology)

⁷ See Election Promotional Material (attached as Exhibit “D”)

⁸ See Affidavit of Maureen Davidson (attached as Exhibit “C” ¶ 4(d))

⁹ See APS’ TMP, § 5, pp. 36-43.

¹⁰ See APS’ TMP, pp. 41, 58.

¹¹ See APS’ TMP pp. 41, 59 (Project TI-5).

Public Library.¹² However, a review of that decision plainly shows that not only does the phrase “major new initiatives” not appear anywhere within the FCC opinion, but the holding and analysis in the opinion is wholly irrelevant to the situation presented here. The issue addressed by the Commission in *Brooklyn Public Library* was whether a telecommunications carrier could recover in the first year of a multi-year contract all of the capital investment that would otherwise be recovered through recurring charges over the life of the contract. The Commission held that an attempt to recover as an up-front charge in the first year of a multi-year contract all of the capital investment to be made by a telecommunications carrier that would otherwise have been recovered through recurring charges over the life of the contract would have constituted an impermissible “advance payment” or “prepayment.”¹³ No such charge or recovery mechanism is contemplated by the APS application.

In denying APS’ request for funding based on the alleged inclusion of “major new initiatives,” the SLD has violated its duty to enforce the Commission’s rules and has instead engaged in impermissible rulemaking of its own. In compliance with an explicit Congressional directive that USAC be limited to implementation of the FCC rules,¹⁴ the Commission has emphasized that SLD (as a division of USAC) can perform only administrative functions and may not “make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress.”¹⁵ Indeed, SLD is “prohibited from making decisions of law or policy” and must limit its activities “to implementing existing rules and policies established by the Commission.”¹⁶ But SLD’s “major new initiatives” standard for APS’ application has no precedent in

¹² Request for Review of the Decision of the Universal Service Administrator by Brooklyn Public Library, Brooklyn, New York; Federal-State Joint Board on Universal Service, CC Docket No. 96-45, 15 FCC Rcd 18598 (2000) (“*Brooklyn Public Library*”).

¹³ *Id.*, ¶ 15.

¹⁴ See Conference Report on H.R. 3579, H.R. Rept. No. 105-504, 105th Cong. 2d Sess.

¹⁵ *Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, 13 FCC Rcd. 25058, 25067 (1998)..

¹⁶ *Id.*

Commission rules or orders. Moreover, even if Commission rules *did* prohibit “major new initiatives,” there is no attempt to fund a major new initiative here since the funding requested in APS’ Year 5 application is needed and designed to take the next step in implementing APS’ TMP. Furthermore, the services requested in APS’ Form 470 all fall within the scope of APS’ TMP. As demonstrated, APS is engaged in no major new initiative, nor does SLD have any authority for denying funding on this ground.

B. The Services Requested In APS’ Form 470 Were Competitively Bid

Under the schools and libraries universal service support mechanism, eligible schools may apply for discounts on eligible telecommunications services, Internet access, and internal connections.¹⁷ The Commission’s rules require eligible schools and libraries to seek competitive bids for all services eligible for discounts.¹⁸ In order to comply with this competitive bidding requirement, an applicant must first submit to the Administrator a completed FCC Form 470 setting forth the applicant’s technological needs and listing the services for which it seeks discounts.¹⁹ APS complied with this requirement and the Administrator posted the Form 470 on its web site where all potential service providers could view and consider it.²⁰ Once the Form 470 has been posted for 28 days and the applicant has signed a contract for eligible services with a service provider, the applicant must then submit a completed Form 471 application to notify the Administrator of the services that have been ordered, the service provider, and an estimate of the funds needed to cover the discounted portion of the price of the eligible services.²¹ After APS’ Form 470 had been posted for at least 28 days, it submitted a Form 471 that provided all

¹⁷ 47 C.F.R. §§54.502, 54.503.

¹⁸ 47 C.F.R. § 54.504.

¹⁹ 47 C.F.R. § 54.504(b)(1), (b)(3).

²⁰ See APS’ Form 470 (attached as Exhibit “E”).

²¹ 47 C.F.R. § 54.504(c).

required information.²² Nevertheless, despite APS' compliance with the Commission's rules, its funding requests were denied. As discussed more fully below, this denial was improper.

Pursuant to the Commission's rules, the aforementioned "competitive bid requirements apply in addition to state and local competitive bid requirements and are not intended to preempt such state or local requirements."²³ In New Mexico, public entities are required by the Procurement Code to use a competitive process for all purchases of goods and services. N.M.S.A.1978, §§ 13-1-102 to 122. The New Mexico Office of the State Purchasing Agent, in an effort to maximize savings and get the lowest possible prices, allows for entities such as the Western States Contracting Alliance ("WSCA") to take the place of individual government procurement procedures. New Mexico was the lead state for WSCA and has approved pricing agreements for use by all branches of the New Mexico state government, state agencies, and local public bodies, including public schools such as APS.

The pricing agreements approved by the WSCA for computer equipment and services were obtained through competitive source selection procurement. Fully consistent with the Procurement Code of the State of New Mexico, the WSCA solicitation sought vendors that could provide information technology goods and services directly from the manufacturer, thereby yielding the lowest possible cost per unit. To more completely trace the competitive bidding method that is the subject of this appeal, APS will set out the process in detail.

The WSCA was formed in 1993 by fifteen Western State purchasing directors. The purpose of the WSCA's formation was for states to join together to achieve more cost-effective

²² See Funding Commitment Decision Letter referencing Form 471 Application Number 320461.

²³ 47 C.F.R. § 54.504(a).

and cost-efficient acquisition of quality products and services. Since its inception, over three billion dollars worth of purchases have been made through the WSCA.²⁴

The WSCA's initial procurement request for computer equipment and services was advertised with a Public Notice distributed by the states of Colorado, Idaho, Nevada, New Mexico, and Utah.²⁵ The initial RFP was issued on May 26, 1999, and the 62-page Amended RFP was issued on June 16, 1999. New Mexico received over 2000 "hits" to its website during the course of this procurement process. The RFP set forth the specifications sought and laid out the competitive bidding process.²⁶ On June 24, 1999, the WSCA finalized the RFP by publishing the evaluation methodology to be used for the subject procurement.²⁷

In response to the Public Notice and RFP, twenty (20) different companies submitted proposals for evaluation to the WSCA. Eighteen (18) of those companies were deemed to have submitted responsive proposals, based on their responses to the criteria set forth in the RFP.²⁸ The purchasing agents of Colorado, Nevada, New Mexico and Utah then conducted the evaluation process based on the aforementioned Collaborative Evaluation Methodology. The 18 companies submitting responsive proposals were evaluated and eight companies were selected as finalists.²⁹ The finalists were then asked to submit best and final offers by August 23, 1999. The finalists made oral presentations and demonstrations during the week of August 24-27, 1999. The four evaluating state representatives met with the New Mexico Purchasing Director on August 27, 1999 to discuss the evaluation results and cast their votes for award.³⁰ Based on the companies' respective scores, the Evaluation Committee unanimously recommended that, of the

²⁴ See WSCA's webpage www.state.nm.us/spd/WSCAmain.html (relevant portions attached as Exhibit "F").

²⁵ See Public Notice (attached as Exhibit "G").

²⁶ See Amended RFP (attached as Exhibit "H").

²⁷ See Collaborative Evaluation Methodology (attached as Exhibit "I").

²⁸ See List of Companies Submitting Responsive Proposals (attached as Exhibit "J").

²⁹ See List of Companies Selected as Finalists (attached as Exhibit "K").

³⁰ See Evaluation Charts One & Two (attached as Exhibit "L").

eight finalists, the five highest ranked companies should be awarded price agreements effective September 3, 1999 through September 2, 2004 (Compact, CompUSA, Dell, Gateway, and IBM).³¹

Included in these price agreements were additional, predetermined discount percentages to be applied to subsequent purchase prices after cited cumulative sales volume levels were reached. Stated another way, once the cumulative sales volume (from the 15 WSCA states) passed certain “trigger points,” additional price discounts would apply from that point forward. The success of these price agreements exceeded all expectations and all applicable discounts were triggered very early on. According to Michael C. Vinyard, State Purchasing Agent for New Mexico, the prices available under the WSCA agreements are the lowest available anywhere in the country.³²

The FCC rules and regulations provide that “eligible schools, libraries, and rural health care providers seeking discounted services or reduced rates should be allowed to purchase services from a master contract negotiated by a third party.”³³ In fact, allowing school districts like APS “to order eligible telecommunications services from a master contract negotiated by a third party is consistent with [the FCC’s] goal of minimizing universal service costs and therefore is also consistent with 47 U.S.C. § 254(h)(1).”³⁴ Thus, funding should not have been denied simply because APS ordered services from a vendor who had entered into a pricing agreement with the WSCA.

³¹ See List of Companies Awarded Price Agreements (attached as Exhibit “M”).

³² See Vinyard E-mail Memorandum Attached to Correspondence from Michelle M. Lewis, Coordinator Educational Technology Fund (attached as Exhibit “N”).

³³ See *Federal-State Joint Board on Universal Service* (Fourth Order on Reconsideration), 13 FCC Rcd. 5318, 5452 ¶ 232 (1997)

³⁴ *Id.*

As demonstrated, the WSCA procurement process was extremely thorough and competitive. However, the competitive bidding process did not end there. In December 2001, APS submitted a Form 470 that was posted on the SLD's website (Application Number: 559770000394437). Information regarding the nature and scope of APS' requested services, as set forth in its Form 470, was available to all potential service providers, who were all able to access information about APS' technology needs. The ability of APS to benefit from the pricing agreements reached as a result of the WSCA's competitive procurement process, coupled with APS' strict compliance with the Commission's competitive bidding rules, ensured that the principles of competitive neutrality so highly valued by the FCC and SLD were implemented.³⁵

Following APS' posting of its Form 470, IBM submitted draft Statements of Work ("SOW") with regard to the internal connection services requested by APS. After negotiations between APS staff and IBM, a final SOW was agreed upon.³⁶ IBM also submitted a SOW for network cabling. Although APS rejected IBM's offer to provide network cabling (local vendors had already been selected to provide these requested services), APS awarded the other contracts to IBM based on IBM's pricing, as set forth in their WSCA-approved Price Agreement Terms and Conditions, Model Participating Addendum, and IBM Products and Price Schedule (all documents are available for public viewing on the WSCA website at: <http://www.state.nm.us/spd/wsca94151.html>), prior experience, qualifications, and the quality of their SOWs. Importantly, since IBM was one of the 5 companies awarded a price agreement through the aforementioned WSCA procurement process, APS was able to maximize savings and obtain services at some of the lowest prices available in the country.

³⁵ See Federal-State Joint Board on Universal Service, Order on Reconsideration, CC Docket No. 96-45, 12 FCC Rcd. 10095, 10098, ¶ 9 (1997).

³⁶ See Affidavit of Maureen Davidson, (attached as Exhibit "C").

Pursuant to FCC regulations, the procurement methods employed by APS complied with all applicable rules on competitive bidding, including local and state regulations. New Mexico received over 2000 “hits” to its website during the course of the procurement. As indicated, 20 different companies submitted proposals, 18 of which were deemed responsive. From those 18 companies, 8 were selected as finalists. From the 8 finalists, 5 were awarded price agreements. APS then posted its Form 470, which was available to all potential vendors and service providers for bidding. All potential bidders were treated equally, and none had advance knowledge of the information contained in the Form 470. Nor did APS maintain any improper relationships with service providers prior to the competitive bidding process that would have unfairly influenced the outcome. In the end, IBM was the only vendor who submitted a responsive proposal for the services requested in APS’ Form 470. After a thorough review by APS, the SOWs were accepted based on the criteria set forth in the Commission’s regulations. Therefore, funding should not have been denied on this basis.

C. The Decision To Deny Funding To APS Was Arbitrary And Capricious, Given That Other School Districts’ Funding Requests Were Granted Based On Nearly Identical Form 470 Summary Descriptions

The USAC-SLD denial of funding letter also states that APS’ funding requests were denied because APS’ 470 failed to “clearly” describe the “specific services” it was seeking. (The denial letter also referred to “the RFP” when there was none, other than those released as part of the WSCA process described above.) Specifically, the SLD told APS that it had filed an “encyclopedic” Form 470 that requested a broad array of services, rather than specific services. To the extent the description of services provided in its Form 470 played a role in funding being denied, SLD’s denial of funding on this basis was arbitrary and capricious, given the fact that

SLD has repeatedly granted funding to other school districts that used either substantially similar or much broader service descriptions in their Form 470s.

APS' Form 470 requested the following internal connection services for 130 buildings: wiring (Cat3, Cat5, coax, fiber, conduit, wiring accessories); routers, servers, switches, hubs, and upgrades; PBX, KSU, ARS, console, components, and upgrades, voice compression module, VIC, VoIP; video CODEC, MCU, MPEG encoder, PVBX, video group and desktop equipment, EMMI; maintenance/installation, technical support, documentation, extended warranty; wireless service, LAN; video equipment (broadband amplifier, cable box and modem); ATM equipment (edge device, EMMI); hardware and upgrades for internal connections (CSU/DSU, antenna, tape backup, line sharing device, media converter, modem, monitor, multiplexing, satellite dish, TA, terminal server, UPS, zip drive, DIMM, transceiver); internal connections components (backup power supply and batteries, cabinets, and power strips, circuit card, Ethernet card, graphics card, hard disk array controller, RAID, MAU, NIC, SNMP module, multiport serial card); operational software and upgrades, e-mail software, client access licenses, programming and configuration charges; construction costs, contingency fees, leasing fees, professional services, per diem, travel time.³⁷

A review of Form 470s from other school districts reveals that several districts, whose requests for funding *were* granted, submitted virtually identical descriptions in their Form 470s.³⁸ For instance, both the Houston Independent School District ("Houston") and the San Francisco Unified School District ("San Francisco") submitted Form 470s with nearly identical

³⁷ See APS' Form 470. (attached as Exhibit "E").

³⁸ Given the Albuquerque School District's inability to review *all* Form 470s submitted by schools, school districts, consortiums, and libraries around the country (there were 1580 Form 470s submitted by school districts in California alone during the relevant funding period), only a representative sample of what is presumably hundreds of school districts is included in this letter for comparison purposes.

descriptions of the internal connections for which they were requesting funding.³⁹ For the SLD to deny funding to APS based on the specificity of its service descriptions is entirely arbitrary and capricious given the SLD's decision to grant funding to both Houston and San Francisco, who submitted nearly identical Form 470s with nearly identical service descriptions.

Additionally, SLD approved funding for a number of school districts whose Form 470s contained much broader and less specific service descriptions than APS. The Denver School District 1 ("Denver"), the Kansas City School District ("Kansas City"), and the St. Louis City School District ("St. Louis") all submitted Form 470s with much broader descriptions of services than the Form 470 submitted by APS.⁴⁰ For example, whereas APS specified the 5 types of wiring it would need, Denver's Form 470 simply requested "internal wiring."⁴¹ Similarly, whereas APS specified the types of video equipment that it would need, Denver simply requested "video equipment."⁴²

In fact, although APS provided summary descriptions of each requested service, Denver, Kansas City, and St. Louis all submitted Form 470s with mere one or two word references to the services being requested. All were unarguably broader than APS' Form 470. The inconsistent and discriminatory treatment of APS is even more glaring when its Form 470 is compared to that of the Los Angeles Unified School District ("Los Angeles").⁴³ Los Angeles simply listed individually in alphabetical order the same functions and services that APS grouped together in line items. Nevertheless, Los Angeles' request for funding was granted.

Though APS has included just a few examples of the relative breadth of the services requested by the various schools, a cursory review of the Form 470s identified indicates that the

³⁹ See Houston and San Francisco Form 470s (attached as Exhibits "O" & "P").

⁴⁰ See Denver, Kansas City, and St. Louis Form 470s (attached as Exhibits "Q", "R", and "S").

⁴¹ See Denver Form 470.

⁴² Id.

⁴³ See Los Angeles Form 470 (attached as Exhibit "T").

services requested by APS were as well or better defined than those of other schools who were granted funding. The summary description of services requested found in the Form 470s of Denver, Houston, Kansas City, Los Angeles, San Francisco, and St. Louis were all deemed sufficient for the requested funding to be granted. However, despite the fact that APS' description of the services requested was either as narrow or narrower than those of other schools whose funding requests were granted, its funding requests were denied. To the extent the decision to deny APS' requests for funding was based on the purported inadequacy of the summary description found in its Form 470, this criterion appears to have been arbitrarily and capriciously applied only to APS, as the funding requests of numerous other school districts were all granted based on equally broad or broader Form 470s. The "law does not permit an agency to grant to one person the right to do that which it denies to another similarly situated."⁴⁴ Just as "[t]here may not be a rule for Monday, and another for Tuesday," there may not be one rule applied only to APS and another for Denver, Houston, Kansas City, Los Angeles, San Francisco, and St. Louis.⁴⁵

III. CONCLUSION:

As illustrated, APS' funding requests did not involve any major new initiatives. Rather, the requests were made (1) as incremental implementation of a pre-existing technology plan; and (2) in order to build on the foundation established by the previous year's funding. Moreover, the funding requests were based on procurement processes that fully complied with the FCC's rules on competitive bidding. The contracts for the funding requests were awarded based on the responses provided to APS' request for services in its Form 470. Because of the pricing

⁴⁴ Mary Carter Paint Co. v. Federal Trade Com., 333 F.2d 654, 660 (5th Cir. 1964), rev'd on other grounds, 382 U.S. 46 (1965).

⁴⁵ Id.

agreements reached by the WSCA's competitive procurement process, APS was ultimately able to obtain high quality internal connection services at a greatly reduced cost.

Additionally, APS' applications were treated differently by the SLD, as its description of the services (for which funding was denied) was substantially similar, if not identical, to requests made by other school districts whose requests for funding were granted. The SLD's arbitrary and capricious decision has effectively deprived students in APS of much-needed technology assistance. APS fully complied with all competitive bidding requirements. Unfortunately, the SLD appears to have chosen to disregard state and local procurement requirements and practices as well as its own precedent. If the SLD has now decided to reject previously accepted and widely used competitive bidding practices, its new standard should be clearly articulated and applied only prospectively. To apply this new standard inconsistently and without warning unfairly prejudices some of the nation's poorest students. As such, APS requests that the Commission reverse the SLD's decision to deny funding to the Albuquerque Public School District.

Respectfully submitted,

MODRALL, SPERLING, ROEHL, HARRIS
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CERTIFICATE OF SERVICE

I, Arthur D. Melendres, hereby certify that true and correct copies of the preceding Request for Review of the Decision of the Universal Service Administrator by the Albuquerque School District was served this 23rd day of May, 2003, by hand delivery to the following parties:

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Universal Service Administrative Company
Schools & Libraries Division

FUNDING COMMITMENT DECISION LETTER

(Funding Year 2002: 07/01/2002 - 06/30/2003)

March 24, 2003

ALBUQUERQUE SCHOOL DISTRICT
Maureen Davidson
220 Monroe, SE
ALBUQUERQUE, NM 87108

Re: Form 471 Application Number: 320461
Funding Year 2002: 07/01/2002 - 06/30/2003
Billed Entity Number: 143253
Applicant's Form Identifier: Year 5 471 SOW

Thank you for your Funding Year 2002 E-rate application and for any assistance you provided throughout our review. We have completed review of your Form 471. This letter is to advise you of our decision(s).

FUNDING COMMITMENT REPORT

On the pages following this letter, we have provided a Funding Commitment Report for the Form 471 application cited above. We have reviewed each Discount Funding Request on your Form 471 application and have assigned a Funding Request Number (FRN) to each Block 5. The enclosed report includes a list of the FRNs from your application. The SLD is also sending this information to your service provider(s) so preparations can be made to begin implementing your E-rate discount(s) upon the filing of your Form 486. Immediately preceding the Funding Commitment Report, you will find a guide that defines each line of the Report.

NEXT STEPS

FILE FORM 486. Once you have reviewed this letter and have determined that some or all of your requests have been funded, your next step to facilitate receipt of discounts as featured in this letter will be to file an FCC Form 486 with the SLD. The Form 486 notifies the SLD to begin payment to your service provider and provides certified indication that your technology plan(s) has been approved by an SLD certified Technology Plan Approver. The Form 486 and instructions and the list of SLD certified Technology Plan Approvers can be found on the SLD web site at <www.sl.universalservice.org> or you can call the SLD Client Service Bureau at 1-888-203-8100 and ask that the form be sent to you. The Form 486 dated July, 2001 in the lower right corner MUST be used for Funding Year 2002 and for any previous funding years. Submissions of earlier versions of the Form 486 will be returned to you and will not be able to be processed. As you complete Form 486, you should also contact your service provider to verify they have received notice from the SLD of your funding commitments. After the SLD processes your Form 486, we can process invoices for services that have been provided to you.

DEADLINE FOR FORM 486. Form 486 must be postmarked within 120 days of the Service Start Date featured on the Form 486 or within 120 days of the date of the Funding Commitment Decision Letter, whichever is later. If the Form 486 is postmarked after the later of those two dates, the date 120 days before the Form 486 postmark date will become the start date for discounted services. If the service start date is moved, your funding commitment may be reduced. You are advised to keep proof of the date of mailing of your form(s).

REVIEW CIPA REQUIREMENTS. On December 21, 2000, the Children's Internet Protection Act (CIPA) was signed into law. That law requires schools and libraries that receive Universal Service discounts for certain services to adopt an Internet safety policy incorporating the use of filtering or blocking technology on computers with Internet access as a condition of receiving those discounts. Funding Year 2002 may be the Second Funding Year for purposes of CIPA for one or more schools and/or libraries represented on your Form 486. (Funding Year 2002 is the Second Funding Year for purposes of CIPA for a school or library if a Form 486 for Internet access or internal connections was successfully data entered for Funding Year 2001. See the section of the Form 486 Instructions entitled "Impact of CIPA Requirements on Form 486" for more information on First, Second and Third Funding Years.) If Funding Year 2002 is the Second Funding Year for purposes of CIPA for one or more schools and/or libraries represented on your Form 486, those school(s) and/or library(ies) must certify that they are in compliance with CIPA unless state or local procurement rules or regulations or competitive bidding requirements prevent the making of the certification otherwise required. A school or library so prevented may request a waiver for Funding Year 2002. Certification(s) for purposes of CIPA and CIPA waiver request(s) must be made on the Form 486 or the Form 479, whichever is appropriate. See the Form 486 Instructions and the Form 479 Instructions for more information. You may also refer to the SLD web site at <www.sl.universalservice.org> or call the Client Service Bureau at 1-888-203-8100 for more information about Form 486, Form 479, and the requirements of CIPA.

FILE FORM 472 (APPLICANT) or FORM 474 (SERVICE PROVIDER). After a Form 486 has been properly filed, the SLD must receive an invoice from either the applicant or the service provider in order to make payments for approved discounts on eligible services. Form 472, Billed Entity Applicant Reimbursement (BEAR) Form, is filed by the applicant; Form 474, Service Provider Invoice Form, is filed by the service provider.

NEW DEADLINES FOR INVOICES. Invoices must be postmarked within 90 days of the last date to receive service or within 90 days of the date of the Form 486 Notification Letter, whichever is later. If an invoice is postmarked after the later of those two dates, payment will be denied.

TO APPEAL THESE FUNDING COMMITMENT DECISIONS

If you wish to appeal the Funding Commitment Decision(s) (FCD) indicated in this letter, your appeal must be **RECEIVED BY THE SCHOOLS AND LIBRARIES DIVISION (SLD) WITHIN 60 DAYS OF THE ABOVE DATE ON THIS LETTER.** Failure to meet this requirement will result in automatic dismissal of your appeal. In your letter of appeal:

1. Include the name, address, telephone number, fax number, and e-mail address (if available) for the person who can most readily discuss this appeal with us.
2. State outright that your letter is an appeal. Identify which FCD Letter you are appealing. Indicate the relevant funding year and the date of the Funding Commitment Decision Letter. Your letter of appeal must also include the applicant name, the Form 471 Application Number, and the Billed Entity Number from the top of your FCD Letter.
3. Identify the particular Funding Request Number (FRN) that is the subject of your appeal. When explaining your appeal, include the precise language or text from the Funding Commitment Decision Letter that is at the heart of your appeal. By pointing us to the exact words that give rise to your appeal, the SLD will be able to more readily understand and respond appropriately to your appeal. Please keep your letter to the point, and provide documentation to support your appeal. Be sure to keep copies of your correspondence and documentation.
4. Provide an authorized signature on your letter of appeal.

If you are submitting your appeal on paper, please send your appeal to: Letter of Appeal, Schools and Libraries Division, Box 125 - Correspondence Unit, 80 South Jefferson Road, Whippany, NJ 07981. Additional options for filing an appeal can be found in the "Appeals Procedure" posted in the Reference Area of the SLD web site or by calling the Client Service Bureau.

While we encourage you to resolve your appeal with the SLD first, you have the option of filing an appeal directly with the Federal Communications Commission (FCC). You should refer to CC Docket Nos. 96-45 and 97-21 on the first page of your appeal to the FCC. Your appeal must be **RECEIVED BY THE FCC WITHIN 60 DAYS OF THE ABOVE DATE ON THIS LETTER.** Failure to meet this requirement will result in automatic dismissal of your appeal. Further information and options for filing an appeal directly with the FCC can be found in the "Appeals Procedure" posted in the Reference Area of the SLD web site or by calling the Client Service Bureau. We strongly recommend that you use either the e-mail or fax filing options because of continued substantial delays in mail delivery.

to the FCC. If you are submitting your appeal via United States Postal Service, send to: FCC, Office of the Secretary, 445 12th Street SW, Washington, DC 20554.

NOTICE ON RULES AND FUNDS AVAILABILITY

Applicants' receipt of funding commitments is contingent on their compliance with all statutory, regulatory, and procedural requirements of the universal service mechanisms for schools and libraries. FCC Form 471 Applicants who have received funding commitments continue to be subject to audits and other reviews that SLD or the Federal Communications Commission may undertake periodically to assure that funds have been committed and are being used in accordance with all such requirements. If the SLD subsequently determines that its commitment was erroneously issued due to action or inaction, including but not limited to that by SLD, the Applicant, or Service Provider, and that the action or inaction was not in accordance with such requirements, SLD may be required to cancel these funding commitments and seek repayment of any funds disbursed not in accordance with such requirements. The SLD, and other appropriate authorities (including but not limited to USAC and the FCC), may pursue enforcement actions and other means of recourse to collect erroneously disbursed funds. The timing of payment of invoices may also be affected by the availability of funds based on the amount of funds collected from contributing telecommunications companies.

We look forward to continuing our work with you on connecting our schools and libraries through advanced telecommunications services.

Sincerely,

Schools and Libraries Division
Universal Service Administrative Company

Enclosures

A GUIDE TO THE FUNDING COMMITMENT REPORT

Attached to this letter will be a report for each E-rate funding request from your application. We are providing the following definitions.

FUNDING REQUEST NUMBER (ERN): A Funding Request Number is assigned by the SLD to each Block 5 of your Form 471 once an application has been processed. This number is used to report to Applicants and Service Providers the status of individual discount funding requests submitted on a Form 471.

FUNDING STATUS: Each ERN will have one of three definitions: "Funded," "Not Funded," or "As Yet Unfunded."

1. An ERN that is "Funded" will be approved at the level that SLD determined is appropriate for that item. The funding level will generally be the level requested unless the SLD determines during the application review process that some adjustment is appropriate.
2. An ERN that is "Not Funded" is one for which no funds will be committed. The reason for the decision will be briefly explained in the "Funding Commitment Decision," and amplification of that explanation may be offered in the section, "Funding Commitment Decision Explanation." An ERN may be "Not Funded" because the request does not comply with program rules, or because the total amount of funding available for this Funding Year was insufficient to fund all requests.
3. An ERN that is "As Yet Unfunded" reflects a temporary status that is assigned to an ERN when the SLD is uncertain at the time the letter is generated whether there will be sufficient funds to make commitments for requests for internal connections at a particular discount level. For example, if your application included requests for discounts on both telecommunications services and internal connections, you might receive a letter with our funding commitment for your telecommunications funding requests and a message that your internal connections requests are "As Yet Unfunded." You would receive a subsequent letter(s) regarding the funding decision on your internal connections requests.

SERVICES ORDERED: The type of service ordered from the service provider, as shown on Form 471.

SPIN (Service Provider Identification Number): A unique number assigned by the Universal Service Administrative Company to service providers seeking payment from the Universal Service Fund for participating in the universal service support mechanisms. A SPIN is also used to verify delivery of services and to arrange for payment.

SERVICE PROVIDER NAME: The legal name of the service provider.

CONTRACT NUMBER: The number of the contract between the eligible party and the service provider. This will be present only if a contract number was provided on Form 471.

BILLING ACCOUNT NUMBER: The account number that your service provider has established with you for billing purposes. This will be present only if a Billing Account Number was provided on Form 471.

EARLIEST POSSIBLE EFFECTIVE DATE OF DISCOUNT: The first possible date of service for which the SLD will reimburse service providers for the discounts for the service.

CONTRACT EXPIRATION DATE: The date the contract expires. This will be present only if a contract expiration date was provided on Form 471.

SITE IDENTIFIER: The Entity Number listed in Form 471, Block 5, Item 22a will be listed. This will appear only for "site specific" ERNs.

ANNUAL PRE-DISCOUNT AMOUNT FOR ELIGIBLE RECURRING CHARGES: Eligible monthly pre-discount amount approved for recurring charges multiplied by number of months of recurring service provided in the funding year.

ANNUAL PRE-DISCOUNT AMOUNT FOR ELIGIBLE NON-RECURRING CHARGES: Annual eligible non-recurring charges approved for the funding year.

PRE-DISCOUNT AMOUNT: Amount in Form 471, Block 5, Item 23, Column I, as determined through the application review process.

DISCOUNT PERCENTAGE APPROVED BY THE SLD: This is the discount rate that the SLD has approved for this service.

FUNDING COMMITMENT DECISION: This represents the total amount of funding that the SLD has reserved to reimburse service providers for the approved discounts for this service for this funding year. It is important that you and the service provider both recognize that the SLD should be invoiced and the SLD may direct disbursement of discounts only for eligible, approved services actually rendered.

FUNDING COMMITMENT DECISION EXPLANATION: This entry may amplify the comments in the "Funding Commitment Decision" area.

FUNDING COMMITMENT REPORT

Form 471 Application Number: 320461
Funding Request Number: 856741 Funding Status: Not Funded
Services Ordered: Internal Connections
SPIN: 143005607 Service Provider Name: IBM Corporation
Contract Number: N/A
Billing Account Number: N/A
Earliest Possible Effective Date of Discount: 07/01/2002
Contract Expiration Date: 06/30/2003
Annual Pre-discount Amount for Eligible Recurring Charges: \$.00
Annual Pre-discount Amount for Eligible Non-recurring Charges: \$30,273,888.00
Pre-Discount Amount: \$30,273,888.00
Discount Percentage Approved by the SLD: N/A
Funding Commitment Decision: \$0.00 - Bidding Violation
Funding Commitment Decision Explanation: Applicant did not identify the specific services sought--either clearly on the 470 or in the RFP--to encourage full competition on major new initiatives.

Funding Request Number: 856765 Funding Status: Not Funded
Services Ordered: Internal Connections
SPIN: 143005607 Service Provider Name: IBM Corporation
Contract Number: N/A
Billing Account Number: N/A
Earliest Possible Effective Date of Discount: 07/01/2002
Contract Expiration Date: 06/30/2003
Annual Pre-discount Amount for Eligible Recurring Charges: \$.00
Annual Pre-discount Amount for Eligible Non-recurring Charges: \$2,612,997.00
Pre-Discount Amount: \$2,612,997.00
Discount Percentage Approved by the SLD: N/A
Funding Commitment Decision: \$0.00 - Bidding Violation
Funding Commitment Decision Explanation: Applicant did not identify the specific services sought--either clearly on the 470 or in the RFP--to encourage full competition on major new initiatives.

Funding Request Number: 856797 Funding Status: Not Funded
Services Ordered: Internal Connections
SPIN: 143005607 Service Provider Name: IBM Corporation
Contract Number: N/A
Billing Account Number: N/A
Earliest Possible Effective Date of Discount: 07/01/2002
Contract Expiration Date: 06/30/2003
Annual Pre-discount Amount for Eligible Recurring Charges: \$.00
Annual Pre-discount Amount for Eligible Non-recurring Charges: \$5,788,990.00
Pre-Discount Amount: \$5,788,990.00
Discount Percentage Approved by the SLD: N/A
Funding Commitment Decision: \$0.00 - Bidding Violation
Funding Commitment Decision Explanation: Applicant did not identify the specific services sought--either clearly on the 470 or in the RFP--to encourage full competition on major new initiatives.